

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TAMMY L. WILLOUGHBY

Claimant

V.

GOODYEAR TIRE & RUBBER COMPANY

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 1,066,813

ORDER

Respondent and its insurance carrier (respondent) appealed the December 7, 2015, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on April 14, 2016.

APPEARANCES

Bruce Alan Brumley of Topeka, Kansas, appeared for claimant. Timothy A. Shultz and Alison J. St. Clair of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant had two prior right knee injuries in 2010 and 2011. She sustained a work-related right knee injury on August 14, 2013, that gave rise to this claim. ALJ Sanders found:

There is no doubt that Claimant had at a minimum ten percent impairment to the right knee on two occasions prior to the August 14, 2013 accident. However, all the doctors agree that Claimant's work accident on August 14, 2013 resulted in an additional tear in the medial meniscus which required another surgical repair.

Also as a result of the 2013 accident Claimant is performing a less physically demanding job. Such an injury justifies an additional ten percent impairment to the right lower extremity. It is found and concluded that Claimant has a ten percent permanent impairment to the right knee as a result of the August 14, 2013 accident.¹

Respondent maintains that although claimant suffered a new injury as a result of her August 14, 2013, accident, the medical evidence does not support a finding of additional impairment. In the alternative, respondent argues that pursuant to K.S.A. 2013 Supp. 44-501(e), claimant's award should be reduced by the percentage of her preexisting functional impairment, which is conclusively established by her prior workers compensation settlements.

Claimant contends she sustained a 10 percent right lower extremity functional impairment as a result of the August 14, 2013, injury and that the Award should be affirmed.

The issues are:

1. What is claimant's functional impairment for her August 14, 2013, work injury?
2. What, if any, reduction should be made for claimant's preexisting functional impairment?

FINDINGS OF FACT

Respondent stipulated claimant sustained a right knee injury by accident on August 14, 2013, arising out of and in the course of her employment. Therefore, a detailed discussion of how claimant's injury occurred is unnecessary.

Claimant previously suffered a torn right medial meniscus on February 16, 2010, which was surgically repaired. Dr. John H. Gilbert determined claimant had a 2 percent right lower extremity functional impairment. Dr. Daniel D. Zimmerman opined claimant sustained a 20 percent functional impairment of the right lower extremity at the level of the knee. On December 17, 2010, claimant settled her claim based upon a 10 percent functional impairment of the right lower extremity, with all rights remaining open. The settlement transcript provides no explanation of why claimant entered into the settlement agreement. However, the Workers Compensation Director Work Sheet for Settlements (Work Sheet for Settlements) provides:

¹ ALJ Award at 10-11.

(1) Compromise

\$9,344.24 for a running award based on 10% permanent partial impairment of the right lower extremity with all rights left open on application to the Director as if the case had been fully tried.²

On August 9, 2011, claimant again tore her right medial meniscus, which was surgically repaired. Dr. Zimmerman opined claimant sustained a 20 percent functional impairment of the right lower extremity at the level of the knee. On May 7, 2012, claimant settled her claim based upon a 10 percent functional impairment of the right lower extremity with all issues remaining open. The settlement transcript provides no explanation of why claimant entered into the settlement agreement. However, the Work Sheet for Settlements provides:

(1) Compromise

\$10,574.74 for a running award based on 10% permanent impairment of the right leg with all issues open on Application to the Director as if the case had been fully tried.³

Dr. Gilbert evaluated claimant on December 4, 2013, at the request of respondent. On January 10, 2014, after reviewing claimant's right knee MRI, the doctor recommended surgery to repair her right medial meniscus complex tear. He indicated claimant had advanced degenerative disease. Dr. Gilbert was not asked to provide an impairment rating for claimant's 2013 accidental injuries, nor was he asked about the impairment rating he gave for claimant's 2010 accidental injuries.

Dr. Douglass E. Stull surgically repaired claimant's right medial meniscus following her August 14, 2013, accident. After claimant reached maximum medical improvement (MMI), the doctor, in accordance with the *Guides*,⁴ assigned her a 10 percent right lower extremity functional impairment. The doctor was aware claimant had previous right knee injuries and indicated she had preexisting osteoarthritis. He indicated that any time a person has arthroscopic knee surgery for a tear, there is a potential weakening of the joint.

Dr. Zimmerman opined claimant sustained a 20 percent functional impairment to her right lower extremity at the level of the knee after each accident. Following claimant's 2010 right knee injury, Dr. Zimmerman indicated claimant's right knee flexion, when tested three times, was 145, 145 and 142 degrees. Her extension was -12, -14 and -14 degrees.

² Zimmerman Depo., Ex. 7.

³ *Id.*, Ex. 6.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Following her 2011 accident, her flexion was 150, 155 and 150 degrees and her extension was -15, -15 and -15 degrees. The strength in claimant's right lower extremity remained at 100 percent, except the strength in her second through fifth toes on the right foot was 100 percent after her 2010 accident and only 75 percent after her 2011 accident. After the 2011 accident, claimant's right thigh circumference decreased from 19 $\frac{1}{8}$ inches to 17 inches, her right calf circumference went from 15 to 14 inches and her right mid patellar circumference went from 15 to 14 $\frac{1}{4}$ inches.

On September 15, 2014, Dr. Zimmerman again evaluated claimant and, as indicated above, assigned a 20 percent functional impairment of the right lower extremity at the level of the knee using the *Guides*. Dr. Zimmerman indicated he used range of motion to arrive at his impairment rating. When Dr. Zimmerman measured claimant's right lower extremity strength, it was the same as after her 2011 right knee injury. Claimant's right lower extremity circumference measurements were: thigh, 20 $\frac{1}{2}$ inches; calf, 14 $\frac{1}{4}$ inches; and mid patellar, 14 $\frac{3}{4}$ inches. Her right knee flexion tested 140, 140 and 138 degrees and her extension tested -18, -18 and -18 degrees.

On March 1, 2015, in response to a query from claimant's attorney, Dr. Zimmerman explained the difference between claimant's first and second right knee injuries. The doctor also indicated he rated claimant's right knee the same after the 2010 and 2011 accidents and his ratings were based upon range of motion.

When asked how claimant's third right knee injury differed from the first two, Dr. Zimmerman testified:

Q. Okay. And, 'um, specifically how is the -- to the best that you can answer, within a reasonable degree of medical certainty and probability, how is the accident from August [14], 2013, different than the prior two accidents?

A. It's in a different location within the knee joint in terms of the diagnostic study findings.

Q. And I think I understand, are you saying that it was a new tear?

A. Yes. Yes, basically. Yes.

Q. And that the tear wasn't a re-tear of the same location, it's a new tear in a different location?

A. That's what the report seems to imply, yes.⁵

⁵ Zimmerman Depo. at 15-16.

Dr. Zimmerman indicated his 20 percent functional impairment rating was based on claimant's right knee condition when he examined her. The doctor testified he could have used Table 64 and possibly Table 62 of the *Guides* to take into consideration her preexisting condition, but did not do so. Dr. Zimmerman indicated claimant's functional impairment after each of her three work accidents has not changed. The doctor also indicated claimant's ability to run was the same after her 2011 accident as it was after her 2013 accident.

At the request of her attorney, claimant was evaluated by Dr. Edward J. Prostic after her 2010 right knee injury. The doctor noted claimant had a torn right medial meniscus and recommended arthroscopic debridement.

Dr. Prostic next saw claimant on October 14, 2013, for her August 14, 2013, right knee injury. The doctor's report does not mention claimant's 2011 accident, but does indicate she had worsening in 2011 and had a repeat debridement. Dr. Prostic recommended an MRI to check the status of her lateral meniscus and anterior cruciate ligament because he thought claimant had a torn lateral, rather than medial, meniscus.

On June 12, 2015, Dr. Prostic again evaluated claimant. An MRI Dr. Prostic reviewed revealed claimant again tore her right medial meniscus. According to Dr. Prostic, claimant's 2013 accidental injury caused a structural change in her right knee.

Using the *Guides*, Dr. Prostic assigned claimant a 20 percent right lower extremity functional impairment. The doctor testified the factors he used to arrive at his rating included neutral alignment of her knee, 3 millimeters of joint space narrowing, synovitis, subtotal meniscectomy, history of patellofemoral dysfunction and loss of flexion and extension. He also indicated claimant had new tearing of her meniscus from the 2013 accident. Dr. Prostic testified 10 percent of claimant's right lower extremity functional impairment was preexisting and 10 percent was from her 2013 accidental injury. He testified:

Q. How much of your rating that you provided of I think 10 percent new could be attributed to degenerative conditions?

A. Well, most of it is from the degenerative condition. You know, if you just talk about a total menis[c]ectomy, the [*Guides*] would say that's 10 percent. And if you say, gee, she had a partial menis[c]ectomy before and now it's almost total, so it would be 2 versus 10, but the alignment and the range of motion and the synovitis and the joint space narrowing have all come since I saw her following the previous accident and none of those factors were present when I examined her in 2013 after the new accident.⁶

⁶ Prostic Depo. at 22.

Dr. Prostic testified he agreed with Dr. Gilbert that claimant had degenerative disease, but disagreed that claimant had advanced degeneration of the medial compartment. Dr. Prostic testified the prevailing factor for the degeneration was claimant's 2013 accident. He explained the more meniscus removed, the more likely the osteoarthritis accelerates. He then stated he saw no significant degenerative changes after claimant's first surgery and the degenerative changes occurred since claimant's second surgery and second injury, which is why he opined the prevailing factor was her 2013 accident.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁸

K.S.A. 2013 Supp. 44-501(e) states:

An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

(1) Where workers compensation benefits have previously been awarded through settlement or judicial or administrative determination in Kansas, the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting. Where workers compensation benefits have not previously been awarded through settlement or judicial or administrative determination in Kansas, the amount of preexisting functional impairment shall be established by competent evidence.

(2) In all cases, the applicable reduction shall be calculated as follows:

(A) If the preexisting impairment is the result of injury sustained while working for the employer against whom workers compensation benefits are currently being sought, any award of compensation shall be reduced by the current dollar value attributable under the workers compensation act to the percentage of functional impairment determined to be preexisting. The "current dollar value" shall be calculated by multiplying the percentage of preexisting impairment by the

⁷ K.S.A. 2013 Supp. 44-501b(c).

⁸ K.S.A. 2013 Supp. 44-508(h).

compensation rate in effect on the date of the accident or injury against which the reduction will be applied.

(B) In all other cases, the employer against whom benefits are currently being sought shall be entitled to a credit for the percentage of preexisting impairment.

K.S.A. 2013 Supp. 44-508(u) provides:

"Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

Drs. Prostic and Zimmerman concurred that after her 2013 accident, claimant had a 20 percent functional impairment of the right lower extremity. Dr. Prostic concluded 10 percent of claimant's functional impairment was preexisting and 10 percent resulted from her 2013 accident. He indicated claimant sustained new tearing of the meniscus from the 2013 accident. Dr. Zimmerman consistently found that after each of claimant's three right knee injuries, she had a 20 percent right lower extremity functional impairment. Dr. Zimmerman indicated claimant's 2013 right torn meniscus was in a different location than her prior tears. Only Dr. Stull found claimant sustained a 10 percent functional impairment. The Board concurs with Dr. Zimmerman and finds claimant, as a result of her 2013 accident, sustained a 20 percent functional impairment of the right lower extremity.

Claimant asserts respondent must prove claimant's preexisting impairment and notes respondent presented no testimony regarding claimant's preexisting impairment. Claimant cites *Hanson*⁹ in support of her argument. *Hanson* was decided in 2000, well before the 2011 amendments to the Kansas Workers Compensation Act were adopted. Claimant's argument ignores that part of K.S.A. 2013 Supp. 44-501(e)(1), which provides that the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting. K.S.A. 2013 Supp. 44-501(e)(1) requires competent evidence be presented proving preexisting impairment only where there was no prior settlement or award.

Respondent asks the Board for a reduction in claimant's award pursuant to K.S.A. 2013 Supp. 44-501(e). The Board finds *Jackson*¹⁰ applicable. In 2002, Mr. Jackson injured his right shoulder in a work-related accident requiring surgical repair. He settled his claim based upon an 18 percent right upper extremity functional impairment. The Board

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001).

¹⁰ *Jackson v. Amsted Rail Co., Inc.*, No. 1,058,952, 2013 WL 5521839 (Kan. WCAB Sept. 12, 2013).

found Mr. Jackson sustained a 20 percent functional impairment as a result of his 2011 accident. The Board, citing K.S.A. 2011 Supp. 44-501(e), reduced Mr. Jackson's 20 percent functional impairment award by the current dollar value of his preexisting 18 percent functional impairment rating.

Here, claimant settled each of her two prior workers compensation claims based upon a 10 percent right lower extremity functional impairment. In both of those accidents, claimant tore her right medial meniscus. Under K.S.A. 2013 Supp. 44-501(e)(1), claimant's prior settlements conclusively establish the amount of her preexisting functional impairment. Using the Combined Values Chart of the *Guides*, claimant's two prior 10 percent functional impairments combine for a 19 percent functional impairment of the right lower extremity.

The Board is mindful of claimant's argument that K.S.A. 2013 Supp. 44-501(e) does not state the percentage basis of a worker's multiple prior settlements or awards shall be combined to calculate the reduction. K.S.A. 2013 Supp. 44-501(e) is silent on that matter. However, K.S.A. 2013 Supp. 44-501(e)(1) states that where workers compensation benefits have previously been awarded, the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting. The Board must consider all of claimant's prior settlements and the functional impairment on which those settlements were based.

Admittedly, one could argue claimant had a 10 percent functional impairment following her 2010 accident and had the same 10 percent functional impairment following her 2011 accident and, therefore, has only a 10 percent preexisting functional impairment. If that analysis were adopted, claimant could have torn her right meniscus in five separate work accidents, settled each claim for 10 percent and respondent would be entitled to only a 10 percent reduction. That argument also ignores the fact claimant settled two prior claims based upon functional impairments of the right lower extremity totaling 19 percent when combined.

Claimant's three accidents occurred while working for respondent. Therefore, K.S.A. 2013 Supp. 44-501(e)(2)(A) applies. For claimant's current injury she is entitled to 11.14 weeks of temporary total disability compensation at the rate of \$587 per week in the amount of \$6,539.18, followed by 37.77 weeks of permanent partial disability compensation at the rate of \$587 per week, or \$22,170.99, based upon a 20 percent right lower extremity functional impairment for a total of \$28,710.17.

Respondent is entitled to a reduction for claimant's preexisting 19 percent right lower extremity functional impairment. Pursuant to K.S.A. 2013 Supp. 44-501(e)(2)(A), to calculate the present value of claimant's preexisting functional impairment, 38 weeks is multiplied by claimant's \$587 per week benefit rate. Consequently, claimant's award should be reduced by \$22,306 (200 weeks x 19 percent = 38 weeks x \$587 = \$22,306). However, that figure exceeds the \$22,170.99 of permanent partial disability compensation

awarded claimant. Therefore, claimant is entitled to 11.14 weeks of temporary total disability compensation at the rate of \$587 per week in the amount of \$6,539.18, but her permanent partial disability compensation is reduced to \$0.

CONCLUSION

Following claimant's August 14, 2013, accident, claimant has a 20 percent functional impairment of the right lower extremity at the level of the knee. Claimant's award is reduced by the current dollar value of her preexisting right lower extremity functional impairment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹¹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the December 7, 2015, Award entered by ALJ Sanders by finding claimant is entitled to 11.14 weeks of temporary total disability compensation at the rate of \$587 per week in the amount of \$6,539.18, but her permanent partial disability compensation is reduced to \$0, as set forth above.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹¹ K.S.A. 2014 Supp. 44-555c(j).

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Honorable Rebecca A. Sanders, Administrative Law Judge